Nos. 98-1701 and 98-1706

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Our opening brief explains how Titles I and II of the Ports and Waterways Safety Act (PWSA), as amended by the Port and Tanker Safety Act (PTSA) and supplemented by international agreements and implementing Coast Guard regulations, preempt state vessel and navigation rules. First, Title II of the PWSA vests exclusive authority in the Secretary to promulgate rules addressing a number of subjects encompassed by the Washington BAP rules and to issue licenses certifying compliance with those federal requirements. As recognized in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), because Congress intended the Secretary to decide what rules are necessary in the general areas specified in Title II, that Title preempts state rules in those areas even in the absence of a federal requirement precisely on point. And, under an unbroken line of this Court's cases starting with *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), a federal license to operate a vessel may not be supplemented or interfered with by a state requirement. Second, if the Coast Guard has promulgated a federal navigation rule under Title I of the PWSA or determined that there should be no rule on the subject, a state rule on the same subject is ousted. In the absence of such a Coast Guard rule or determination on a matter falling within Title I, however, the state rule would not be preempted. That two-prong approach is mandated by the language of the PWSA (see U.S. Br. 24-28) and this Court's construction of Titles I and II of the PWSA in *Ray* (see *id.* at 25-27), and is consistent with the long history of federal vessel regulation (*id.* at 18-23).

Respondents variously argue that the text of the PWSA does not support our submission, that *Ray*'s holding is limited to design and construction standards for vessels, that inherent state police powers authorize the rules promulgated by the State, and that Section 1018 of the Oil Pollution Act

should be construed to authorize the BAP rules. Those arguments are unpersuasive.

A. State Vessel And Operator Rules Within The Subject Areas Covered By Title II Of The PWSA Are Preempted

Title II of the PWSA (as amended by the PTSA) requires that "the Secretary shall issue, and may from time to time amend or repeal, regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, or manning of vessels * * * as may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 92 Stat. 1483 (codified at 46 U.S.C. 3703(a)). Title II also requires a vessel operator to carry a certificate showing compliance with those rules issued by the Secretary, which, in the case of foreign-flag vessels, may be met with a valid certificate "issued by a foreign nation pursuant to any treaty, convention, or other international agreement to which the United States is a party." 92 Stat. 1486-1487 (codified as amended at 46 U.S.C. 3710, 3711 (1994 & Supp. III 1997)). Thus, Title II preempts state rules in two ways: (1) the Secretary's exclusive duty to promulgate rules with respect to subjects covered by Title II preempts the field as to those subjects; and (2) the holder of a federal license may not be required to meet state standards that would alter or modify a licensee's right to operate a vessel in accordance with the federal license.

1. As confirmed in *Ray*, PWSA Title II preempts state law in the fields addressed by that Title. See U.S. Br. 24-28. Respondents argue that *Ray*'s holding with respect to Title II subjects is limited to design and construction features of vessels. See Wash. Br. 20-24; Resp.-Int. Br. 19.[1] The text of

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[1] Respondent-Intervenors describe *Ray*'s holding as a "plurality" of the Court (Br. 19), but that is plainly incorrect. The Court's opinion with

Title II, however, does not support respondents' argument that "design" and "construction" should be treated differently from "alteration, repair, maintenance, operation, equipping, personnel qualification, or manning of vessels," because all of those subjects appear in the same statutory phrase. See 46 U.S.C. 3703(a). See, *e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (words in a statutory provision should not be treated as "pebbles in alien juxtaposition"). Respondents' argument also is inconsistent with the House Report on the Tank Vessel Act of 1936, which first conferred authority to promulgate regulations on those subjects. That report, which was quoted by the Court in *Ray* (435 U.S. at 166), explained that the Act was intended to establish a "reasonable and *uniform* set of rules and regulations" not only for ship "construction" and "equipping," but also for "operation" and "manning." H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936) (emphasis added) (quoted in U.S. Br. 23).

Moreover, the reasons given by the Court that the Title II design and construction requirements preempt those fields apply equally to the other fields listed in what is now 46 U.S.C. 3703(a). The Court emphasized the mandatory nature of the obligation Congress imposed on the Secretary, who "'*shall establish*' such rules and regulations as may be necessary with respect to the design, construction, *and operation* of the covered vessels *and with respect to a variety of related matters.*" *Ray*, 435 U.S. at 161 (emphasis added); see also *id.* at 163 n.14 (noting the Secretary's authority under Title II "to insure that adequately trained personnel are in charge of tankers"); U.S. Br. 24. Although the State calls the "shall establish" language a "minor textual signal[]" (Wash. Br. 23), the *Ray* Court treated it as

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respect to Parts I, II, and III was unanimous, seven justices joined Parts V and VII, and six justices joined Parts IV and VI. See 435 U.S. at 181 (Marshall, J., concurring in part and dissenting in part); *id.* at 190 (Stevens, J., concurring in part and dissenting in part).

significant in understanding why state rules in those fields under Title II are preempted. The Court noted the requirements that the Secretary engage in consultations before promulgating rules, 435 U.S. at 161[2]; inspect tank vessels "for compliance with the regulations which he is required to issue for the protection of the marine environment," *id.* at 162; and issue a certificate of compliance or accept a foreign certificate that entitles the vessel to navigate in U.S. waters free from state interference, *id.* at 163-164. The Court also emphasized that Congress had determined that uniformity and consistency with international standards applicable to the subjects covered by Title II would best achieve safety and environmental protection, "since the problem of marine pollution is world-wide." *Id.* at 166 (quoting S. Rep. No. 724, 92d Cong., 2d Sess. 23 (1972)).

Those considerations are as pertinent to the "alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels" (46 U.S.C. 3703(a)) as they are to a vessel's "design" or "construction" standards (*ibid.*).[3] State BAP rules on subjects covered by Title II, as

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[2] Under the PWSA provision addressed by the Court in *Ray*, the Secretary was required to consult only with federal agencies. See 435 U.S. at 161 (discussing provision at 86 Stat. 429). That provision was amended by the PTSA to require consultation with "officials of State and local governments," "representatives of port and harbor authorities or associations," and "representatives of environmental groups." 92 Stat. 1484. Congress thus intended that state and local interests would be taken into account *by the Coast Guard* through the consultation process that precedes the adoption of a single federal rule, not imposed unilaterally by States and localities through their *own* independent rules.

[3] The amici States argue (Br. 16-18, 20) that the word "operation" should not be construed so broadly as to preempt exercises of state power to prevent pollution. Since the passage of the Tank Vessel Act of 1936, however, Congress has directed the Federal Government to regulate tankers "with respect to the operation of such vessels" (as well as design, construction, manning, and the duties and qualifications of officers and crew). Act of June 23, 1936, ch. 729, 49 Stat. 1889. See also PWSA, Pub.

codified at 46 U.S.C. 3703(a), therefore, are preempted.[4] "The Supremacy Clause dictates that the federal judgment

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L. No. 92-340, Tit. II, § 201, 86 Stat. 428 (same language); PTSA, Pub. L. No. 95-474, § 5, 92 Stat. 1483 (inclusion of "operation" in list of other subjects). Those regulations with respect to vessel "operation," which are the subject of federal licenses, ordinarily have addressed mechanical or systems-based features of the vessel, or the manner in which personnel must be trained to use on-board equipment. See 46 C.F.R. 2.01-6 (describing "Certificates issued to foreign vessels" by referencing 46 C.F.R. Subch. D, Pt. 35, and 33 C.F.R. Pts. 155, 156, 157, 159, and 164). Moreover, those regulations impose quite stringent and specific anti-pollution standards for on-board equipment, transfer procedures, and handling of oil and other hazardous cargoes. Thus, aspects of vessel operations covered by Title II and by a federal license or certification issued pursuant to Title II are subject to exclusive federal regulation, and state measures in the field covered by the license are therefore preempted. Compare pp. 11-13, *infra* (discussing preemptive effect of different "operating requirements" issued by Coast Guard under Title I).

[4] See provisions of Wash. Admin. Code § 317-21-200 (1999) (watch practices: manning); § 317-21-210 (engineering operating procedures: equipment and operations); § 317-21-215 (operating procedures, pre-arrival tests and designs: equipment and operations); § 317-21-230 (training: personnel qualifications); § 317-21-240 (personnel evaluation: personnel qualifications); § 317-21-245 (work hours: manning); § 317-21-250(1) (language proficiency: personnel qualifications); § 317-21-260(5) (maintenance: repair and alteration); § 317-21-265 (technology: equipment and operations).

The State asserts that it "waives" its drug testing requirements under Wash. Admin. Code § 317-21-235 (1999) when they conflict with a foreign country's requirements, but the affidavit they cite makes clear that the waiver is within the discretion of the enforcing official and is not required by state law. See J.A. 256. In any event, the State concedes that its requirements differ from federal regulations, see Wash. Br. 47-48, and does not deny that its rules have significant extra-territorial effects in ways not contemplated by Coast Guard regulations. See U.S. Br. 33-35. As to its event reporting rule (Wash. Admin. Code § 317-21-130 (1999)), the State makes no attempt to rebut the arguments in our opening brief (at 39-40) for why it is preempted and cites nothing in the memorandum of agreement between the State and the Coast Guard for why the sharing of information about events saves the unilateral state reporting rule.

that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Ray*, 435 U.S. at 165.

2. Respondents do not contest the continuing validity or applicability of this Court's decisions holding that the rights enjoyed under a federal navigation license may not be abridged by additional state requirements. *Ray*, 435 U.S. at 164 ("Congress did not anticipate that a vessel * * * holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States."); U.S. Br. 22 & n.9 (collecting cases).[5]

As this Court has observed in applying that rule in another federal licensing context: "A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963) (footnote omitted). "No State law can hinder or obstruct the free use of a license granted under an act of Congress." *Ibid.* (quoting *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1852)).[6] Yet

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[5] *E.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 215 ("The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do—that is, to give permission to a vessel already proved by her enrolment to be American, to carry on the coasting trade."); *Harman* v. *Chicago*, 147 U.S. 396, 407 (1893) (rejecting city's imposition of license fee on tug operator because then "[t]he license of the United States would be insufficient to give him free access to those waters").

[6] See also *Railroad Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351, 358-359 (1967) (federal license for railroad transfer services cannot be supplemented or overridden by city ordinance); *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954) ("[I]t would be odd if a state could take action amounting to a suspension or revocation of an interstate [motor]

the State's requirement of an "oil spill prevention plan" is tantamount to a state license, because no vessel may legally operate in state waters unless it has filed and received approval for such a "plan"; and that plan must in turn demonstrate compliance with the comprehensive state requirements, many of which operate in fields preempted by federal law or Coast Guard regulations. See Wash. Rev. Code § 88.46.080(1) (1996); see also, *e.g.*, Wash. Admin. Code §§ 317-21-200, 317-21-205, 317-21-210 (1999) (describing what operating, engineering, and navigational requirements must be satisfied in the "oil spill prevention plan").[7]

Respondents argue that the international treaties and agreements pursuant to which the Coast Guard recognizes and enforces such licenses for foreign vessels do not independently preempt state law. That argument is misplaced for two reasons. First, federal preemption under Title II arises from that Title's provision that a foreign vessel may not operate on the navigable waters of the United States without a federal certificate recognized and accepted by the Secretary. See 46 U.S.C. 3711; see also U.S. Br. 30-31.[8] In

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carrier's [Interstate Commerce C]ommission-granted right to operate."); *Barrett* v. *City of New York*, 232 U.S. 14, 31 (1914) (collecting cases).

[7] Although the State now disavows any attempt to impede a vessel from actually entering its waters (Wash. Br. 5 n.5), it has not renounced the civil and criminal penalties called for under state law for vessels that do not comply with the BAP rules. See *id.* at 5. In *Harman*, this Court treated a city's "imposition of a fine" for noncompliance with local licensing rules as a basis for finding a preemptive conflict with federal licensing laws. See 147 U.S. at 406-407. Thus, any effort by the State to impose a requirement that impedes the exercise of rights enjoyed under the federal (or federally-recognized international) license would "den[y] to the vessel in question" the "full enjoyment of the right to carry on the coasting trade." *Sinnot* v. *Davenport*, 63 U.S. (22 How.) 227, 242 (1859).

[8] The State does not cite or discuss 46 U.S.C. 3711. Respondent-Intervenors do cite Section 3711, but misapprehend it, noting that it states that the "Secretary does not have to accept foreign certificates of compliance." Resp.-Int. Br. 45 n.35 (emphasis omitted). Section 3711

Ray this Court noted that Title II of the PWSA "directs the Secretary to inspect tank vessels for compliance with the regulations which he is required to issue for the protection of the marine environment," and that "the consequent privilege of having on board the relevant cargo [is] evidenced by certificates of compliance issued by the Secretary or by appropriate endorsements on the vessels' certificates of inspection." 435 U.S. at 162-163. Respondents do not contest that SOLAS, STCW, MARPOL, and the ISM Code (which is a part of SOLAS) all require certifications that Congress has authorized the Secretary to accept on behalf of the United States. See 46 U.S.C. 3711(a); U.S. Br. 5-9 & n.5.

Second, respondents' contention (Wash. Br. 31; Resp.-Int. Br. 39-42) that the international agreements are not "self-executing" is irrelevant. The general provisions quoted and cited by respondents (Wash. Br. 30-31; Resp.-Int. Br. 41 & n.33), which provide that such international agreements must be given domestic legal effect, have been fully and completely complied with under United States domestic law. See U.S. Br. 7 (SOLAS), 8 n.4 (MARPOL), 9 (STCW), 37

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affords the Coast Guard the opportunity to assess whether the certificate of compliance is valid and reflects the actual conditions aboard the vessel. If the Coast Guard has grounds for rejecting the certificate, it can take appropriate enforcement measures against the vessel. See <<*http://www.uscg.mil/hq/g-m/psc/psc.htm*>> (detailing, *inter alia*, Coast Guard month-by-month detentions of vessels, which flag nations have the best and worst records for detentions, and which vessels are in non-compliance with international conventions). The Coast Guard cannot deny entry to a foreign-flag vessel that fully complies with the certificate of compliance, because to do so would violate the terms of applicable international agreements. See U.S. Br. 7-9, 30-31. And a State may not in any event enforce the certification requirement. Respondent-Intervenors also mischaracterize 46 U.S.C. 3713, which prohibits the operation in U.S. waters of vessels that do not comply with federal regulations but which, by its plain terms, is not restricted to "construction and design characteristics," as respondents erroneously assert. See Resp.-Int. Br. 34 n.28.

(ISM Code).[9] Accordingly, "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *United States* v. *Pink*, 315 U.S. 203, 230-231 (1942).[10]

An illustration of the rule that the State may not impose a requirement that denies a right of a federal licensee is the BAP rule on personnel training. The State says that the United States "misunderstands this requirement" (Wash. Br. 45),[11] which by its plain terms requires "training beyond the training necessary to obtain a license or merchant marine document." Wash. Admin. Code § 317-21-230 (1999). Once a vessel has been duly licensed as complying with STCW requirements, a State has no power to impose any additional requirements on the federal license—even if all the State seeks to do is to doublecheck that the federal gov-

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[9] Contrary to respondent-intervenors' assertion (Br. 42 n.33), the 1995 amendments to the STCW Convention have been implemented by federal law. On June 26, 1997, the Coast Guard issued an interim rule giving full legal effect to the 1995 STCW amendments for personnel serving on U.S. ships as of July 28, 1997. See 62 Fed. Reg. 34,506-34,541; see also *id.* at 5197-5199.

[10] The State asserts that it "has disclaimed power to 'control ships' " because it "directs its regulation at owners and operators to avoid conflict with the operative provisions of international law." Wash. Br. 31-32. The State cannot avoid preemption in that manner. The owners and operators "control" the ships the State seeks to regulate, and it is non-compliance by the vessel and its crew with substantive state requirements that causes the State to impose civil and criminal penalties against the owners and operators.

[11] According to the State, we also "misunderstand[]" the state rules regarding emergency procedures (Wash. Br. 44) and language proficiency (*id.* at 46). Although we disagree with that assessment, to the extent the state rules are susceptible to misinterpretation, they raise serious safety and environmental concerns for vessel operators, who may become confused over what rules to apply. That confusion will only proliferate if other States have the authority to override the national and international regime by imposing their own vessel requirements.

ernment's determination is correct. See p. 6, *supra*. Yet even by its own admission, the State's requirements go beyond STCW requirements. The STCW Code § A-II/2 provision requires personnel to have a requisite understanding of watch practices, uses of compasses, and corre tions to errors in compasses, so that the officer in charge of the navigational watch may make necessary course corrections. See STCW Code § A-VIII/2(21.5.2, 34.2). The state BAP rules micro-manage the officer in charge by requiring frequent comparisons of compass readings, regardless of operating conditions and the potential to divert the officers and crew from other more pressing navigational duties. See Wash. Admin. Code § 317-21-205(3) (1999) (discussed at Wash. Br. 41). Precisely because of such differences in approach to training and certification, Congress determined that the national rule would be to accept the training and crew procedures certified under such agreements as the STCW and SOLAS, and to vest the Coast Guard with the power to implement and enforce those requirements. See U.S. Br. 7-8, 30-31, 35. Thus, with respect to those BAP rules that adopt, supplement, or seek to impose requirements in addition to those recognized to obtain a license or certification to operate in United States waters, they are preempted.[12]

3. The amici States point to a 1993 memorandum of agreement (MOA) between California and the Coast Guard as creating a "cooperative program for oil spill prevention and response." Amici States Br. 8. That MOA, however, is no longer valid. It has been superseded by a 1997 memoran-

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[12] See provisions in Wash. Admin. Code § 317-21-215 (1990) (pre-arrival equipment tests: SOLAS certificate); § 317-21-220 (emergency procedure proficiency: STCW certificate); § 317-21-230 (crew training: STCW certificate); § 317-21-250(1) (language proficiency: STCW certificate); § 317-21-260(1) to (3) (management policies and practices: ISM Code certificate). See generally U.S. Br. App. 1a-17a.

dum of agreement, which the amici States allude to and which fully supports our submission in this case. Memorandum of Agreement on Oil Pollution Prevention and Response Between the Commander, Eleventh Coast Guard District, and the State of California (July 1997). Whatever ambiguity amici may perceive in the now-superseded 1993 MOA, the 1997 MOA reiterates that "[f]ederal inspection requirements associated with vessel safety are not subject to supplemental State regulations." *Id.* ¶ V.A.1. It further provides that "the State has the authority to promulgate regulations concerning oil spill prevention which do not conflict with, and which are not otherwise preempted by, Federal law." *Id.* ¶ X.A. Cooperative Federal-State efforts to respond to and contain oil spills are an important aspect of protecting the marine environment, but those efforts do not support the conclusion that federal vessel and operator regulations lack preemptive force over state rules on the same subjects.

B. A Coast Guard Regulation Issued Pursuant To Title I Of The PWSA, Or A Decision That There Should Be No Requirement At All, Preempts State Law

Title I of the PWSA, as amended by the PTSA, addresses "Vessel Operating Requirements." See 92 Stat. 1472; 33 U.S.C. 1223 (caption). The subjects addressed in that Title pertain to "operations" in the sense of navigating the vessel—the types of traffic safety rules this Court noted in *Ray*. See 435 U.S. at 161 & n.9. Congress enacted Title I in 1972 "to broaden the Coast Guard's authority to establish rules for port safety and protection of the environment." *Id.* at 169 n.20. As we have explained (see U.S. Br. 26-28), a federal regulation issued pursuant to Title I (or a Coast Guard determination that there should be no requirement at all on a subject) ousts a state rule on the same subject, whereas a state rule is valid in the absence of such a regulation or determination. See *Ray*, 435 U.S. at 171-172 (the "relevant inquiry" under Title I is "whether the

Secretary has either promulgated his own * * * requirement * * * or has decided that no such requirement should be imposed at all"); *id.* at 174 (quoting H.R. Rep. No. 563, 92d Cong., 1st Sess. 15 (1971) (Title I revised to "make it absolutely clear that the Coast Guard regulation of vessels preempts state action in the field").[13] Respondents do not cite a single case of this Court upholding a state navigation requirement when a federal rule addresses the same subject.

In an attempt to justify certain state rules as "necessitated by local conditions," the State defends its rule governing operation in restricted visibility (Wash. Admin. Code § 317-21-200(1)(a) (1999)) as compelled by the "congested waters of the Strait of Juan de Fuca and Puget Sound" (Wash. Br. 42). Yet by its terms the BAP rule applies throughout state waters. When promulgating its rule requiring two licensed deck officers on watch on the bridge, see 33 C.F.R. 164.13(c), the Coast Guard specifically intended the rule to apply in "all navigable waters of the U.S.," particularly in the congested waterways of the United States. 58 Fed. Reg. 27,630 (1993). The uniform application of that rule furthers compliance with the STCW crew rest requirements implemented domestically through 46 C.F.R. 15.1109, 15.1111, which are designed to prevent fatigued mariners from navigating vessels. The State, however, asserts the authority to impose a rule that overrides the STCW requirement (Wash. Br. 43), notwithstanding the contrary judgments by the Coast Guard and the members of the International Maritime Organization that a uniform re-

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[13] For an example of the type of local traffic rule that would not be preempted, see Wash. Admin. Code § 317-21-205(4) (1999) (providing that "[a] master of a tanker carrying cargo shall use at least one assist tug for anchoring and departing anchorages in the port of Port Angeles. The port of Port Angeles includes all navigable waters west of 123 degrees, 24 minutes west longitude encompassed by Ediz Hook"). There is no Coast Guard regulation on that subject, see U.S. Br. App. 6a, nor any Coast Guard determination that there should be no such requirement at all.

gime enables a master to organize his crew rest schedule to avoid the hazards of a tired crew when vessels travel to multiple ports over a span of a few days.

A number of Washington State's BAP rules that appear to fall into the realm governed by Title I rather than Title II of the PWSA concern subjects also addressed by the federal rules.[14] Those BAP rules are preempted. By contrast, although certain of the equipment rules adopted by other States, which are featured by the amici States (Br. 6-9), might be preempted by applicable Coast Guard regulations, other state rules addressed to other matters would not be. In any future case challenging the validity of such rules in other States, the preemption analysis set out should be applied to analyze specific rules at issue.

C. Neither A State's Police Powers Nor Section 1018 Of The Oil Pollution Act Of 1990 Saves The Washington BAP Rules From Preemption Under The PWSA And International Agreements

Notwithstanding the foregoing provisions of federal law, respondents and their amici contend that two sources of law save Washington's BAP rules from preemption: inherent police powers and Section 1018 of OPA. Respondents are wrong on both counts.

1. This Court long ago rejected the first proposition—that the reserved powers of the States authorize them to

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[14] See provisions of Wash. Admin. Code § 317-21-215(1)(a) (1999) (prearrival tests and inspections); § 317-21-540 (advance notice of entry) (discussed in Wash. Br. 43-44). It bears noting that, like the state restricted-visibility rule discussed in the text, these other BAP rules are not specifically directed to particularly problematic passageways in its waters, but rather apply throughout all state waters. Moreover, to the extent that provisions of Wash. Admin. Code §§ 317-21-130 (1999) (event reporting of marine casualties) and 317-21-235 (drug testing) are considered rules of local application, they also are preempted by the existence of federal rules. See U.S. Br. 33-34, 39-40.

regulate navigation, at least where Congress has taken the matter in hand:

> The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, [are] therefore but the exercise of an undisputed power. When, therefore, an act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this, without regard to the source of power whence the State Legislature derived its enactment.

Sinnot v. *Davenport*, 63 U.S. (22 How.) 227, 243 (1859).

The amici States argue, however, that "local pollution control measures regarding tank vessels are no different from the local pilotage requirements sustained in *Cooley*." Amici States Br. 16. That contention is incorrect. First, as the *Cooley* Court itself noted, *Congress* by statute permitted States to impose local pilotage requirements; the state rule was not upheld as an exercise of inherent police power. See *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 315 (1852) (citing 1789 statute). Second, although the federal Clean Air Act (see 42 U.S.C. 7402, 7511b(f)) and Clean Water Act (see 33 U.S.C. 1314, 1342) do expressly provide a role for States in establishing certain anti-pollution rules that apply to vessels, those provisions do not override the congressional determinations established in the PWSA and PTSA that uniform *federal* standards shall apply to the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of vessels (46 U.S.C. 3703(a)), and that the Secretary likewise may adopt preemptive navigation rules of national or local applicability to promote safety and protection of the marine environment (33 U.S.C. 1223(a) (1994 & Supp. III 1997)).

The State calls its navigation rules oil "spill prevention" requirements (Wash. Br. 12, 13, 38, 40, 42, 44), and the amici States assert that the vessel rules support the underlying purpose of pollution prevention (Amici States Br. 12-13). But those motivations do not alter the reality that the rules directly regulate vessels in navigation. In any event, a State's *reasons* for adopting such measures are irrelevant under the Supremacy Clause. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). And, in fact, this Court has rejected similar police-power rationales for state regulation of vessels. See, *e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 53, 200-202 (rejecting argument that State's regulation is "nothing more than [regulation of] property * * * subject to the control of the sovereign power"); *Sinnot*, 63 U.S. (22 How.) at 242 (rejecting argument that state police power permits vessel licensing requirement where federal license rule exists); *Harman*, 147 U.S. at 408-409 (rejecting city's contention that license fee was justified to fund deepening of Chicago River). Indeed, in *Ray* the Court distinguished precisely the kinds of environmental rules upon which respondents rely (Wash. Br. 15; Resp.-Int. Br. 17-20) by noting that "in none of the relevant cases sustaining the application of state laws to federally licensed or inspected vessels did the federal licensing or inspection procedure implement a substantive rule of federal law addressed to the object also sought to be achieved by the challenged state regulation." 435 U.S. at 164 (citing, *e.g.*, *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960)). In *Ray*, as here, Titles I and II are designed to protect the marine environment, as well as to promote safety and protect life and property. See 33 U.S.C. 1223(a)(1), 1224; 46 U.S.C. 3703(a).[15]

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[15] Nor does *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), support respondents' position. In *Askew*, the Court upheld a state rule imposing strict liability for an oil spill "from any waterfront

2. Respondents' reliance on Section 1018 of OPA is also misplaced. In our opening brief (at 44), we demonstrate, *inter alia*, that Section 1018 simply does not apply to this case because all of the preemptive federal rules at issue here derive from some source of law other than OPA. The State nonetheless contends that "[t]he language of subsections 1018(a) and (c) is very broad" (Wash. Br. 25) and that "[i]t would make no sense for Congress to express a broad savings of state powers from preemption in § 1018, if it had already preempted those state powers" (*id.* at 26). The State provides no support for that proposition in the text of OPA or any of this Court's decisions. Section 1018 provides only that "[n]othing in this Act"—*i.e.*, nothing in OPA itself—shall affect the authority of the States to impose certain requirements. 33 U.S.C. 2718. It in no way affects the preemptive effect of *other* Acts (such as the PWSA and PTSA), of international agreements, or of Coast Guard regulations issued under those Acts or to enforce those agreements. See U.S. Br. 44-45. The Conference Report on OPA expressly states that it "does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Company*, 435 U.S. 151 (1978)," H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990),

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facility" or "any ship destined for or leaving such facility," *id.* at 327, in part because "[i]t is clear at the outset that the Federal Act does not preclude, but in fact allows," States to impose additional liability for oil spills, *id.* at 329. The United States, as *amicus curiae*, had expressed the view that separate vessel equipment requirements contemplated under state law would be preempted by recently promulgated Coast Guard regulations, see 71-1082 U.S. Br. at 30-35, but acknowledged that a direct conflict with state law had not been presented since the State had not yet issued regulations. Accordingly, the Court opined that "the question whether such [state] regulations will conflict with Coast Guard regulations * * * should await a concrete dispute under applicable Florida regulations." 411 U.S. at 337. What the Court actually decided in *Askew*—that States may impose additional *liability* requirements for oil spills—is a proposition with which no party to this litigation disagrees.

which confirmed the preemptive effect of Title II of the PWSA and of Coast Guard regulations issued under Title I.[16]

The State attempts to explain away the Conference Report's affirmation of *Ray* by asserting that "[t]he reference to *Ray* in the Conference Report confirms only that the broad language of § 1018 does not undo the careful holding in *Ray* that the field of tanker design and construction is preempted." Wash. Br. 27. Having misstated the holding in *Ray* (see U.S. Br. 24-28; pp. 2-4, *supra*), the State then imputes that misunderstanding to the Conference Committee that inserted Section 1018. But Congress's intent not to "undo" *Ray* must include the aspects of the decision in *Ray* addressing the field-preemptive effect of Title II of the PWSA and the preemptive effect of Coast Guard regulations addressing other subjects under Title I of the PWSA.

Unlike respondents, the court of appeals recognized that Section 1018 by its terms does not apply to the PWSA or other statutes that confer authority on the Coast Guard to issue regulations that preempt state law. See Pet. App. 11a-12a. The court nevertheless held that Section 1018 of OPA, as Congress's most recent statute in the field, divests the Coast Guard of that authority under other statutes. *Id.* at 15a-16a. Respondents make no effort to defend that startling proposition, which cannot be reconciled with the bedrock principle that Congress can change the law only by passing a new law. See U.S. Br. 44. Nor do respondents

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[16] The legislative history of OPA quoted by the State (Wash. Br. 26-29) similarly shows only that Congress did not intend for OPA to preempt state law in certain respects. Nothing in any of the legislative history cited by respondents evidences any intent by Congress that Section 1018 would negate the preemptive scope of rules promulgated pursuant to the PWSA or PTSA, which are intended to further environmental protection as well as vessel safety. And contrary to respondent-intervenors' contention (Br. 31 n.23), the statements of Coast Guard officials it quotes in no way suggest that OPA freed States to adopt rules that conflict with Coast Guard regulations.

contest the applicability of this Court's decisions holding that savings clauses should not be read to conflict with directives in federal statutes. See *id.* at 45 n.20 (collecting cases). Thus, there is no occasion here for the Court to attempt to resolve the differences among the other parties over whether Section 1018 applies only to Title I of OPA or only to financial requirements. It is sufficient in this case for the Court to hold that the phrase "[n]othing in this Act" means what it says and that Section 1018 therefore does not trump the preemptive power of *other* extant federal laws.

3. The State contends that some of its BAP rules incorporate applicable Coast Guard regulations and international treaty provisions and therefore should not be deemed preempted because they are "identical" to those standards. See Wash. Br. 19, 44 (citing *California* v. *Zook*, 336 U.S. 725 (1949)). In *Zook*, the Court upheld a state law prohibiting the sale or arrangement of any transportation over a state highway if the transporting carrier lacked a permit from the Interstate Commerce Commission. The *Zook* Court based its decision in part on the absence of any intent by Congress for the federal law to be exclusive, while noting at the same time that "if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down." 336 U.S. at 728. Unlike in *Zook*, that situation is manifestly present here, in light of the comprehensive national and international regime regarding vessels that this Court specifically recognized in *Ray*. And even as to regulations promulgated under Title I, Congress intended that there be one *decisionmaker*, even when national uniformity was not required. See *Ray*, 435 U.S. at 177. Moreover, the State asserts the authority to apply its own enforcement standards to its allegedly identical substantive rules, and thereby impose civil fines and criminal punishments on violators. See Wash. Br. 5. But because state officials do not have the authority to enforce national and international standards—only the Coast Guard has been granted such

authority (see U.S. Br. 8)—such unilateral actions by state officers threaten to impair the Nation's international obligations. See Belgium *et al.* Amici Br. 4; Canada Amicus Br. 5.

Moreover, the *Zook* Court emphasized that the subject of the state rules—"to enforce safety and good-faith requirements for the use of its own highways"—was within "the state's normal power." 336 U.S. at 737. As we demonstrate (U.S. Br. 18-23) and as was recognized by the district court (Pet. App. 61a), regulations of vessels in interstate or international navigation are traditionally a matter of national concern. In numerous other cases, the Court has held that identical or supplemental state laws are preempted by federal law.[17] In any event, respondents never contest our central thesis for conflict: that the international regime requires uniformity in vessel and staffing requirements (and in aspects of navigation regulated by the Coast Guard under Title I that are enforced by national officers). That regime is frustrated by the efforts of the several States of the United States to enforce their own rules.

4. The detailed international and federal statutory and regulatory regime enforced by the Coast Guard has produced significant benefits to the marine environment of the United States. Since the *Exxon Valdez* disaster, the aver-

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[17] See, *e.g.*, *Bethlehem Steel Co.* v. *New York State Labor Rel. Bd.*, 330 U.S. 767, 776 (1947) (identical state rule preempted by federal rule where exercise of concurrent jurisdiction means that enforcement "action by [state agency] necessarily denies the discretion of the [federal]"); *Missouri Pac. R.R.* v. *Porter*, 273 U.S. 341, 346 (1927) (state rule "cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction"); *Southern Ry.* v. *Railroad Comm'n*, 236 U.S. 439, 447-448 (1915) (virtually identical state requirement on railroads held preempted by federal rule). *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963), which the amici States cite (Br. 21), is inapposite, because in that case the state and federal standards were dissimilar.

age number of oil spills of more than 10,000 gallons has dropped by approximately 50%; the ratio of gallons spilled per million gallons of oil shipped has decreased by 50% (from ten to five gallons spilled per million shipped); and there have been no major oil spills of more than one million gallons from vessels since 1990. U.S. Dep't of Transp., *Ten Years Later: Oil Spill Prevention and Response in the United States, 1989-1999*, at 8 (1999). The comprehensive federal regime, which applies uniformly to vessels moving in international and interstate commerce, confirms the wisdom of the longstanding national and international approach to vessel safety. By contrast, "it is almost impossible for [the master] * * * to acquaint himself with the laws of each individual State he may visit." *The Roanoke*, 189 U.S. 185, 195 (1903) (invalidating State of Washington lien law applied against vessels).

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For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Solicitor General

NOVEMBER 1999